Supreme Court, U.S.
FILED

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No. 99-

IN THE

Supreme Court of the United States

LETICIA JARAMILLO and JOSEPH REY,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a member of the listening audience entitled to judicial review of an FCC broadcast license renewal order under 47 U.S.C. § 402(b)(6), which provides for judicial review by "any . . . person who is aggrieved or whose interests are adversely affected" by such an order?

2. Is a member of the listening audience entitled to judicial review of an FCC broadcast license renewal order where the grounds for such review are based upon the licensee's dishonesty, rather than the content of its programming?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Press Communications, LLC (formerly Press Broadcasting Company, Inc.) was a party to the proceeding before the Federal Communications Commission and before the United States Court of Appeals for the District of Columbia Circuit and is being served as a respondent herein.

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Petitioners, Leticia Jaramillo and Joseph Rey ("Jaramillo and Rey"), by their attorneys, hereby respectfully request the issuance of a writ of certiorari reviewing the judgment below of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

Petitioners sought to appeal a decision of the Federal Communications Commission ("Commission" or "FCC") before the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals"). The opinion of the Court of Appeals, a copy of which is attached as Appendix A, is unreported. The opinion of the Commission, a copy of which is attached as Appendix B, is reported at 14 FCC 9296 (1999).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 12, 1999. The Court of Appeals denied a timely petition for rehearing on December 27, 1999. The opinion of the Court of Appeals, a copy of which is attached as Appendix C, is unreported. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions implicated by the decision of the Court of Appeals are Article III, Section 2 of the United States Constitution, and 47 U.S.C. § 402(b)(6). Article III, Section 2 provides, in relevant part that, "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies . . ."

47 U.S.C. § 402(b)(6) provides that

> [a]ppeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia . . . by any other person who is aggrieved or whose interests are adversely affected by any Order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.[1]

STATEMENT OF THE CASE

In predicting whether "the public interest, convenience or necessity" will be served by renewing a broadcast license, the FCC must consider, among other things, the applicant's "character, background and training." *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946); 47 U.S.C. §§ 309(a) (considerations in granting or renewing license) and 308(b) (application requirements). License renewal proceedings, "in which the listening public can be heard," are a "principal means" of assuring that the licensee will meet its overriding public interest obligations. *See Columbia Broadcasting Sys.* v. *Democratic Nat. Comm.*, 412 U.S. 94, 110 (1973).

Petitioners Letitia Jaramillo and Joseph Rey live in central Florida, where they are viewers of Station WKCF(TV), which operates on Channel 18 at Clermont, Florida, and serves the Orlando area. In 1996, Press Broadcasting Company, Inc. ("Press") applied to the FCC to renew its license for WKCF(TV). Petitioners opposed Press' license renewal application on the ground that Press lacked the character required of all FCC licensees. In support, petitioners submitted to the FCC evidence that Press had aided and abetted a fraudulent exchange of channels that ultimately allowed it to operate on

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1. The application at issue, and that was contested by petitioners before the FCC, was an application for license renewal pursuant to 47 U.S.C. § 307(c)(1).

Channel 18 at Clermont, Florida.[2] Petitioners' evidence included the declaration of one of the participants in the transaction indicating that the exchange of channels was accomplished through money laundering. The FCC nevertheless issued an order renewing the license to Press.

Petitioners sought judicial review under Section 402(b) of the Communications Act , which provides for judicial review in the United States Court of Appeals for the District of Columbia of any FCC license renewal order both by the renewal applicant and by "any other person who is aggrieved or whose interests are adversely affected" by such order. 47 U.S.C. §§ 402(b)(2) (renewal applicant) and 402(b)(6) ("any other person"). The Court of Appeals dismissed the petition for review. The court's cryptic one-paragraph opinion concluded that petitioners had "not demonstrated that they have standing as members of the viewing public."[3] Petitioners timely sought rehearing, which the Court of Appeals denied.

REASONS FOR GRANTING THE WRIT

The petition for a writ of certiorari should be granted because the opinion below conflicts with this Court's decisions governing judicial review under the Communications Act. The decision below also threatens to curtail or eliminate entirely the right of members of the broadcast audience to challenge,

2. Petitioners were principals of Rainbow Broadcasting, Ltd. which operated WRBW (TV) in competition with WKCF(TV) until WRBW(TV) was sold in 1999. At the time that petitioners filed their opposition to Press' license renewal, WKCF(TV) still competed with WRBW(TV). The FCC granted Press' assignment of license of WKCF(TV) in September, 1999 and dismissed a petition to deny the sale. That decision has been appealed to the full commission and remains pending.

3. The Court's holding that petitioners' competitive harm is "entirely hypothetical" also clouds the concept of competitor standing. Given that petitioners continued to compete with Press at the time they filed their petition — the relevant period for examining a party's standing — it is erroneous to conclude that petitioners' injury as a competitor was conjectural. *See Friends of the Earth, Inc.* v. *Laidlaw Environmental Services, Inc.*, 120 S. Ct. 693, 705 (2000).

for any reason, the FCC's decision to grant or renew a license to broadcast into their viewing area.

Section 402(b) of the Communications Act entitles license applicants to judicial review of FCC orders respecting their licensing applications or renewal applications (e.g. orders denying renewal). 47 U.S.C. §§ 402(b)(1-4). Section 402(b)(6) grants a parallel entitlement to "any other person aggrieved or whose interests are adversely affected" by such orders (e.g., orders granting renewal) . 47 U.S.C. § 407(b)(6). In *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 477 (1940), this Court held unanimously that while the Communications Act's purpose was "to protect the public" rather than competitors, a competitor was entitled under the predecessor of Section 402(b)(6) "to appeal and to raise in [court] *any* relevant question of law" respecting an FCC licensing order (emphasis added). In so holding this Court recognized the obvious self-interest that competitors have in monitoring FCC license decisions, but it necessarily concluded "that the need for some representation of the public interest" in judicial challenges "outweighed the need that it be selfless." D.H. Ginsburg, M.H. Botein and M.D. Director, *Regulation of the Electronic Mass Media* 137 (2d ed. 1991). In *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 999 (D.C. Cir. 1966) the D.C. Circuit, relying on *Sanders* and recognizing that members of the listening public, as opposed to competitors, "may be the only objectors" in renewal proceedings, held that members of the listening public were likewise among the class of persons sufficiently interested in a licensing determination to participate in that determination and to seek judicial review under section 402(b). 359 F.2d at 399 n.8.[4]

This Court has repeatedly endorsed the teaching of then Judge Burger in *United Church of Christ. See, e.g., Association*

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4. The parties agreed, and the DC Circuit concluded, that standing to participate before the FCC and to seek judicial review were governed by the same principles that govern standing under Article III.

of Data Processing Serv. Org., Inc. v. *Camp*, 397 U.S. 150, 154 (1970) (recognizing range of values that may legitimately be vindicated by judicial review); *Columbia Broadcasting Sys., supra.* (recognizing role of public participation in FCC licensing scheme). Indeed, less than two years ago, in sustaining the standing of voters under the Federal Election Campaign Act and Article III to challenge a Federal Election Commission decision, this Court twinned *Sanders* and *Church of Christ* for the proposition that when Congress employs the word "aggrieved"— as it has done in the Communications Act and the FECA — it has signaled its intent "to cast the standing net broadly. . . ." *Federal Election Commission* v. *Akins*, 524 U.S. 11, 19 (1998).

By holding that petitioners, as members of the WKCF(TV) viewing area, lacked standing to seek judicial review of the FCC's license renewal order, the Court of Appeals has narrowed "the standing net" that Congress created when it enacted Section 402(b)(6) and has contravened the holding in *United Church of Christ* — which this Court has also embraced. For almost 35 years the principle recognized in *United Church of Christ* has protected the interest that all members of the viewing public have in who will be licensed to broadcast into their viewing area. The DC Circuit, the only Court of Appeals to which FCC licensing appeals may be taken, should not be permitted to repudiate *United Church of Christ*, without this Court's review.

Nor can *United Church of Christ* be distinguished as involving a viewer challenge based upon the applicant's past broadcasts, rather than the applicant's character. The foundational principle supporting both challenges is the same — the "enforceable public obligation" of broadcasters to serve the public interest. *Columbia Broadcasting Sys., Inc.* v. *FCC*, 453 U.S. 367, 396 (1981) (citing *United Church of Christ*, 359 F.2d at 1003). Moreover, any such distinction cannot be drawn without repudiating this Court's holding in *Sanders*, which recognizes that a challenger may seek judicial review on "any"

question that is material to the ultimate license renewal decision. There is no basis in this Court's precedents for creating a dual class of persons "aggrieved" by the award or renewal of a broadcast license, a "first class," consisting of competitors, who can challenge the license on any relevant ground, and a "second class," consisting of mere members of the viewing audience, who may challenge the license on some relevant grounds, but not others.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED AND FILED OCTOBER 12, 1999

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term, 1999

No. 99-1264

Leticia Jaramillo and Joseph Rey,

Appellants

v.

Federal Communications Commission,

Appellee

Press Communications LLC,

Intervenor

BEFORE: Silberman, Henderson, and Tatel, Circuit Judges

ORDER

Upon consideration of the motion to dismiss, the responses thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Appellants have not met their burden of clearly alleging facts

that would establish standing to bring this action. Appellants have not demonstrated that they have standing as members of the viewing public, *see Jaramillo v. FCC*, 162 F.3d 675 (D.C. Cir. 1998), nor can they be considered to have competitor standing as their alleged future injury is entirely hypothetical. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (holding that injury must be "actual or imminent, not 'conjectural' or 'hypothetical' ").

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam
s/ JHS
s/ KLH

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION ADOPTED MAY 28, 1999 AND RELEASED JUNE 7, 1999

Federal Communications Commission

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. BRCT-961001ZK

File No. BALCT-970603IA
BAL-970603IB
BALH-970603IC
BALH-970603ID
BALTVL-970603IE

In re Applications of

PRESS BROADCASTING COMPANY, INC.

For Renewal of License of Station WKCF(TV),
Clermont, Florida

and

PRESS BROADCASTING COMPANY, INC.

and

PRESS COMMUNICATIONS, LLC

Appendix B

For Consent to the Assignment of the Licenses of Stations WBDU(AM) and WKXW(FM), Trenton, New Jersey, WBSS(FM), Millville, New Jersey, WKCF(TV), Clermont, Florida, and W04CN, Cocoa, Florida

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1999 **Released: June 7, 1999**

By the Commission: Chairman Kennard not participating.

1. The Commission has before it an application filed February 13, 1998, by Leticia Jaramillo, Joseph Rey and Rainbow Broadcasting, Ltd. (collectively, "Rainbow") for review of the January 14, 1998, letter decision of the Chief, Video Services Division, Mass Media Bureau, denying their petitions to deny the above-captioned applications filed by Press Broadcasting Company, Inc. (Press) for renewal of its license for station WKCF(TV), Channel 18, Clermont, Florida, and for the pro forma assignment of license from Press to Press Communications, LLC. Press filed an opposition on March 2, 1998.

2. As initially filed, the petitions to deny were based on the same facts, circumstances and arguments raised by Rainbow, and rejected by the Commission, in connection with an application to assign the license of station WTKS(FM), Cocoa Beach, Florida, from Press to Paxson Broadcasting of Orlando, L.P. *Press Broadcasting Company, Inc.*, 13 FCC Red 1026 (1998), *appeal dismissed, Leticia Jaramillo v. FCC*, 162 F.3d 675 (D.C. Cir. 1998). Rainbow supplemented the petitions on May 1, 1997, citing to

language in an *Initial Decision* granting Rainbow's application for extension of time to construct WRBW-TV, Orlando, Florida, which, they contend, raises a substantial and material question of fact requiring designation of the above-referenced applications for a hearing. *See Initial Decision*, 12 FCC Red 4028, 4048, 4059 (ALJ 1997). In affirming the *Initial Decision*, however, the Commission specifically disavowed the ALJ's language on which Rainbow relies. *Rainbow Broadcasting Company*, FCC 98-185 at n.2 (released August 5, 1998), *aff'd, Press Communications, Inc. v. FCC*, Case No. 98-1366 (D. C. Cir., May 25, 1999).

3. In view of the foregoing and based on our review of the Bureau's underlying decision, we conclude that no basis exists to warrant reversal. Accordingly, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review filed by Leticia Jaramillo, Joseph Rey and Rainbow Broadcasting, Ltd. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
s/ Magalie Roman Salas
Magalie Roman Salas
Secretary

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 27, 1999

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term, 1999

No. 99-1264

Leticia Jaramillo and Joseph Rey,

Appellants

v.

Federal Communications Commission,

Appellee

Press Communications LLC,

Intervenor

BEFORE: Edwards, Chief, Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

Appendix C

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk